Petition

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81-1422

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

SMOKE-CRAFT, INC.,

Petitioner,

vs.

UNITED STEEL WORKERS OF AMERICA,
AFL-CIO-CLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether one-half of an NLRB-jointly certified collective bargaining representative may petition a federal district court for confirmation of an arbitration award pursuant to the Federal Arbitration Act, where both the contract and the arbitration were solely between the employer and the collective bargaining representative, and the petitioner was not a party to the arbitration.

2. Whether summary judgment can be granted where the pleadings raise genuine issues of fact, where the movant's motion presents no evidence on those issues, and where affidavits and other evidentiary material show that substantial issues of fact exist.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. Procedural Background	3
B. Facts	7
C. The District Court's Decision	13
D. The Court of Appeals' Decisions	17
REASONS FOR GRANTING THE WRIT	17
I. The Decision Below, Because Of Its Far-Reaching Impact On The Concept of NLRB Joint Certification Of A Collective Bargaining Representative, Presents A Question Of Federal Law Of Such Importance That It Should Be Resolved By This Court. The Decision Below Conflicts With Decisions By The National Labor Relations Board And By The Circuit Courts of Appeals	21
II. The Decision Below, In Affirming Entry Of Summary Judgment On Issues Which Were Not Treated In The Motion For Summary Judgment, On Which There Were Outstanding And Triable Issues Of Fact, And On Which The District Court Made No Findings As Required By FRCP	

Rule 56, Is Such A Departure From The Accepted And Usual Course Of Judicial Proceedings In The Federal Courts That It Calls For An Exercise Of This Court's Power of Supervision..... 33

CONCLUSION..... 44

APPENDICES

National Labor Relations Act (29 U.S.C. § 151 et seq.), Sections 8(a)(5), 8(b)(1)(A) and 9(a) A-1

Federal Arbitration Act (9 U.S.C. § 1 et seq.), Sections 9 and 10 ..... A-2

Decision of the 9th Circuit Court of Appeals dated August 13, 1981 ..... A-4

Amended Opinion of the 9th Circuit Court of Appeals dated September 28, 1981 ..... A-19

Findings and Recommendation of the United States Magistrate dated March 31, 1977 ..... A-34

Order of the District Court dated May 26, 1977..... A-40

Findings and Recommendation of the United States Magistrate dated December 5, 1977 ..... A-42

Order of the District Court dated August 16, 1978..... A-55

Judgment of the District Court dated October 18, 1978..... A-58

Judgment of the 9th Circuit
Court of Appeals..... A-60

Order on Rehearing dated October 30,
1981 ..... A-61

TABLE OF AUTHORITIES

Page

Automatic Heating and Service Company
194 NLRB 1065 (1972) 24, 26

Baker v. Fleet Maintenance Incorporated
409 F2d 551 (7th Cir. 1969) 22

Citizens Bldg. v. Western Union Tel. Co.
120 F2d 982 (5th Cir. 1941) 38

Hanford Atomic Metal Trades Council v. General Electric Co.
353 F2d 302 (9th Cir. 1966) 41

Int'l Brotherhood of Teamsters v. NLRB
587 F2d 1176 (D.C. Cir. 1978) 27, 28

Las Vegas L.J. Ex. Bd. of Cul. W. & B. v. Las Vegas Hacienda, Inc.
383 F2d 667 (9th Cir. 1967) 23

Local 13 International Longshoremen's and W.U. v. Pacific Maritime Association
441 F2d 1061 (9th Cir. 1971) 21

Medo Photo-Supply Corporation v. NLRB
321 US 678 29

Mid-South Packers, Inc.
120 NLRB 495 (1958) 24, 26

Sherwood Ford, Inc.
188 NLRB 131 (1971) 28

Suburban Newspaper Publications, Inc.
230 NLRB No. 287 (1977) 31

Statutes:

9 U.S.C. § 9 ..... 3, 4, 21, 38

9 U.S.C. § 10 ..... 5, 22, 39, 40, 41

28 U.S.C. § 1254(1) 3

29 U.S.C. § 158(a)(5) 3

29 U.S.C. § 158(b)(1)(A) 3, 28

29 U.S.C. § 159(a) 3

29 U.S.C. § 159(c) 32

Other Authorities

Federal Rules of Civil Procedure
Rule 12B(6) 4

Federal Rules of Civil Procedure
Rule 56 33

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioner, Smoke-Craft, Inc. ("Smoke-Craft")*, asks this Court to review the August 13, 1981 judgment of the United States Court of Appeals for the Ninth Circuit in the case of United Steelworkers of America, AFL-CIO-CLC and Smoke-Craft, Inc.

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*Smoke-Craft's parent company is International Multifoods Corporation. Smoke-Craft reports, pursuant to Sup. Ct. R. 28.1, that it has no affiliate companies or subsidiaries that are not wholly owned.

OPINIONS BELOW

The original Opinion of the Court of Appeals is not reported as yet, but is reproduced in the separate Appendix to this petition at A-4 to A-18.

The Amended Opinion of the Court of Appeals is not reported as yet, but is reproduced in the separate Appendix to this petition at A-19 to A-33.

The Findings and Recommendation of the United States Magistrate are not officially reported, but are reproduced in the Appendix at A-34 to A-39 and A42 to A-54.

The Order of the district court, dated August 16, 1978, is unreported, but is reproduced in the Appendix at A-55 to A-57.

The Judgment of the district court dated October 18,1978, is unreported, but is reproduced in the Appendix at A-58 to A-59.[1]

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[1]The Appendix to this petition is cited as "A." Citations to the record below are to the Record before the court of appeals. The Record is cited as "R."

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on August 13, 1981. Smoke-Craft's Petition for Rehearing and Suggestion for Rehearing en Banc was denied on October 30, 1981. Appendix at A-61-62. This Court has jurisdiction to review the Court of Appeals decision by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in the Petition are reproduced in the Appendix at A-1 to A-3. They are Sections 8(a)(5), 8(b)(1)(A) and 9(a) of the National Labor Relations Act and Sections 9 and 10 of the Federal Arbitration Act.

STATEMENT OF THE CASE

A. Procedural Background.

Respondent, United Steelworkers of America, AFL-CIO-CLC ("Steelworkers") filed a petition in the district court for

an order confirming an arbitration award. The petition alleged that the Steelworkers "was a bargaining representative of Smoke-Craft, Inc. employees;" that the Steelworkers and Smoke-Craft "entered into a collective bargaining agreement;" that the collective bargaining agreement contained a grievance procedure culminating in arbitration; that a grievance had been filed by "the union;" that the grievance was submitted to an arbitrator; that the arbitrator had rendered an award; and that the Steelworkers was entitled to confirmation of the award.

Smoke-Craft filed a motion to dismiss pursuant to Rule 12B(6), Federal Rules of Civil Procedure, based upon the fact that the Steelworkers was not a "party to the arbitration" as required by the Federal Arbitration Act, 9 U.S.C. § 9 (R. 62), and supported its Motion with an affidavit and documentary evidence. The United States

Magistrate, in his findings and recommendation, concluded that the Steelworkers was a party to the arbitration and recommended that the motion to dismiss be denied (R. 120-123). The recommendation of the Magistrate was approved by the United States District Judge, with the proviso that "it may well be, upon a full development of the facts that a different result will obtain." (R. 145).

Smoke-Craft filed its answer and cross petition for an order vacating the arbitration award (R. 146-151). The answer raised seven affirmative defenses. The cross petition asked the court to vacate the award pursuant to 9 U.S.C. § 10 because of substantive invalidity and failure to adhere to the essence of the collective bargaining agreement.

The Steelworkers filed a motion for summary judgment (R. 153), asserting there was no issue of fact and that it was enti-

tled to prevail as a matter of law. The United States Magistrate, in his findings and recommendation, recommended that the Steelworkers motion for summary judgment be granted (R. 199-205). Smoke-Craft filed objections (R. 206-223), and the United States District Judge (Belloni, J.) requested additional information and legal memoranda (R. 231-232). The parties responded, and, on August 16, 1978, the United States District Judge issued his order granting the Steelworkers' motion for summary judgment.

The Ninth Circuit Court of Appeals affirmed the order of the district court in an opinion dated August 13, 1981. Smoke-Craft filed a timely petition for rehearing and suggestion for rehearing en banc, urging primarily that the Court of Appeals had erred in holding that the Steelworkers was a party to the arbitration, and also in affirming a summary

judgment where the pleadings raised genuine issues of fact, where the movant's motion presented no evidence on those issues, and where affidavits and other evidentiary material showed that substantial issues of fact existed. On September 28, 1981, the Ninth Circuit Court of Appeals issued an Amended Opinion which rewrote a section of the original opinion, but held to the same result, affirming the district court judgment. Subsequent to the issuance of the amended opinion, Smoke-Craft's petition for rehearing and suggestion for rehearing en banc were denied on October 30, 1981.

B. Facts

This case was before the Ninth Circuit on an appeal from the grant of a Motion for Summary Judgment. As such, there has never been a full development of the facts, and the facts stated in the Affidavit (R. 63-73) and other materials

submitted by Smoke-Craft, Inc. must be taken as true. The Statement of Facts consists, therefore, of the facts shown by those materials and the facts which Smoke-Craft believes would have been shown at trial had the matter been tried.

1. The Joint Bargaining Representative

Smoke-Craft, Inc. is an Albany, Oregon, beef product manufacturer. In 1974, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO Local 324 (Meat Cutters) and the United Steelworkers of America, AFL-CIO.CLC (Steelworkers) jointly intervened in a National Labor Relations Board representation proceeding and asked Smoke-Craft's employees to elect them, together, as the exclusive bargaining representative (Affidavit, R. 67). After a campaign, the Steelworkers-Meat Cutters combination (who referred to their entity as the "Unity

Union" (R. 259)) was certified by the NLRB as the exclusive collective bargaining representative of Smoke-Craft employees (R. 260).

On January 31, 1975, Smoke-Craft and the jointly certified collective bargaining representative entered into a collective bargaining agreement. In March of 1975, the joint representative filed the grievance lying at the root of this litigation, denominating itself "United Steelworkers and Amalgamated Meat Cutters" (R. 262). One attorney represented the union at the arbitration hearing, and Smoke-Craft later negotiated a settlement with him. The arbitrator's bill following settlement was directed to the single union, "United Steelworkers of America and Meat Cutters Local 324" (R. 263). Following the settlement the Steelworkers, evidently dissatisfied with bargaining through the NLRB-certified joint bargaining repre-

sentative, set in motion the bizarre chain of events which has marked this proceeding. First, the Steelworkers disclaimed interest in continuing as part of the joint representative on March 17, 1976. Then, the Steelworkers proceeded unilaterally to try to reopen the settled arbitration. From that point on, the joint collective bargaining representative became a virtual nonentity so far as the Steelworkers was concerned.

2. The Arbitration Proceeding

In March, 1975, the certified collective bargaining representative of Smoke-Craft's employees filed a grievance, leading to an arbitration hearing held December 15, 1975. At the hearing, the bargaining representative appeared through its attorney, Mr. Mike Dye. Only the certified collective bargaining representative participated in the proceeding. There was

no independent participation by the Steelworkers (Affidavit, R. 65).

After the arbitration hearing, the parties settled the dispute. Under the settlement, Smoke-Craft returned certain persons to active employment status and granted retroactive credit under its Profit-sharing Plan. In turn, the union agreed not to pursue the matter further (Affidavit, R. 65). On February 5, 1976, following the settlement, the arbitrator, John W. Keltner, sent his statement for services to Smoke-Craft and the certified bargaining representative, adding that "I am pleased that you were able to work out a satisfactory agreement" on the matter (R. 70).

On March 17, 1976, the Steelworkers sent a letter to the National Labor Relations Board, stating that it no longer wanted to be a part of the certified collective bargaining representative at Smoke-

Craft (R. 72). Then, on April 9, 1976, over two months after the parties settled the arbitration, Mr. Wayne Anderson, a steelworkers business agent, sent Arbitrator Keltner an unsolicited brief which he captioned

"In the Matter of the Arbitration
Between
Smoke-Craft, Inc.
and
United Steelworkers of America" (R. 73)

The caption of the Steelworkers' solo submission to the arbitrator neglects to mention the jointly certified bargaining representative, substituting the non-certified Steelworkers; further, one searches the body of the brief in vain for any mention whatsoever of the Meat Cutters or the joint representative.

On September 2, 1976, Arbitrator Keltner, adopting the Steelworkers' format, issued an award under the heading "In the Matter of the Arbitration between United Steelworkers of America, District

38, and Smoke-Craft, Inc." (R. 35). It is this award--an award not sought by the certified collective bargaining representative of Smoke-Craft's employees--which the Steelworkers asked the District Court to confirm.

C. The District Court's Decision

Smoke-Craft moved the District Court to dismiss the Steelworkers' petition based on the Steelworkers' lack of party status, and when that motion was denied by the District Court, filed an answer and cross-petition raising seven affirmative defenses and cross petitioning to vacate the award because, inter alia:

1. The award purports to confer rights upon persons at times when they were not employees of Smoke-Craft (R. 150).

2. The award is not based upon the collective bargaining agreement to which

Smoke-Craft was party and which limits the arbitrator's powers (R. 150).

3. The award is entirely inconsistent with the collective bargaining agreement and with principles of labor relations applied commonly in industry (R. 150).

4. The award makes no reference to the principles of mitigation and requires neither that those benefited by the award have mitigated their purported damages nor that any backpay awarded them take into account their interim earnings (R. 150).

5. The award was in excess of the arbitrator's powers, which were exercised so imperfectly that no mutual, final or definite award was made upon the subject matter submitted (R. 151).

6. The award was issued in manifest disregard of governing legal principles and fundamental rationality (R. 151).

The Steelworkers filed a motion for summary judgment, and Smoke-Craft responded, setting forth in detail the areas of disputed fact (R. 170-178), and supporting its contentions with documentary evidence (R. 195-198). The Magistrate recommended that plaintiff's motion be granted. However, the Magistrate discussed only two of the issues raised by the pleadings, party status and settlement. He did not even mention, let alone resolve, the remaining issues. After Smoke-Craft had filed its objections in the District Court (R. 206-224), the Steelworkers conceded that the Magistrate had not dealt with a number of the issues:

> "On the other hand, due to the history of the litigation and the early clash over party status and settlement, these issues were not fully treated by the Magistrate. As a result, the court might well consider referring these issues to the magistrate for his consideration." (USW Memorandum, R. 228, ll. 14-18)

Then, specifically addressing the issues of fact raised by Smoke-Craft's six affirmative defense, the Steelworkers' brief admitted:

> "To the extent Smoke-Craft maintains that the arbitrator has sought to recommence the arbitration, it is possible that an issue of fact might develop. Hence, this limited issue is possibly not one for summary judgment." (USW Memorandum, R. 228, ll. 19-22)

Finally, the Steelworkers acknowledged:

> "The Court may well find that the defendant's other affirmative defenses do raise issues of material fact, or that they were not addressed by the magistrate. In that case, the Court will aid immeasurably the judicial micro-economy of this lawsuit by issuing a partial summary judgment deciding those issues which are not [sic] ready for judgment." (R. 229, ll. 9-14)

On August 16, 1978, the district court, per Judge Belloni, entered an order granting the Steelworkers' motion for summary judgment (R. 269-270). In doing

so, the court referred only to the issues of settlement and party status. It did not address any of the issues which even the Steelworkers conceded were not discussed by the Magistrate. It declined the Steelworkers' invitation to decide the issue of substantive validity "in the first instance." And it granted summary judgment on the issues of settlement and party status despite the existence of questions of triable fact on those issues.

D. The Court of Appeals' Decisions

The Ninth Circuit upheld the District Court's order granting the Steelworkers' motion for summary judgment in two stages: First, on August 13, 1981, it issued an opinion which discussed only the issues of (1) settlement and (2) standing. Like the District Court, the Court of Appeals failed even to mention the issues raised by the remaining affirmative defenses and cross-petition to vacate, nor did it deal with

Smoke-Craft's argument that it is impermissible to grant summary judgment without resolution of the outstanding issues. On the issue of standing, the Court of Appeals stated in its original opinion that the Steelworkers was "a party to the arbitration" because its name appeared on the collective bargaining agreement as part of the title of the jointly certified collective bargaining representative. The Court also, without citation of authority, advanced the view that a unilateral activity such as that of the Steelworkers did not involve "bargaining," and the Steelworkers could therefore proceed without regard to the wishes of the other constituent of the joint representative.

In its amended opinion, the Court rewrote the "standing" section to eliminate both of the reasons cited in the original opinion. In their place, the Court contends that the Steelworkers'

status was a procedural question for the arbitrator to decide (Amended Opinion, p. 6). The Court further contends that petitioner "raised no objection to the standing of Steelworkers to proceed with the arbitration," and suggests that this forecloses inquiry into the Steelworkers' status before the Court.

REASONS FOR GRANTING THE WRIT

The judgment below calls for review by this Court because the "party status" principle adopted by the Ninth Circuit literally abandons principles of law applicable to a jointly certified bargaining representatives. The Ninth Circuit's holding will profoundly influence the orderly administration of collective bargaining agreements executed by a jointly-certified collective bargaining representative. It will effect not only Smoke-Craft, Inc., but all employers who deal

with a jointly certified collective bargaining representative, and indeed, all employees who must decide whether to grant such a joint representative the status of their collective bargaining representative. Review by this Court is essential because the Ninth Circuit's holding on this issue directly conflicts with decisions of the National Labor Relations Board as well as prior decisions of the circuit courts.

In addition, the Writ should be granted because the Ninth Circuit's decision affirmed a summary judgment where numerous issues of fact were not addressed, let alone resolved, by the trial court, in direct contravention of the requirements of the Federal Rules of Civil Procedure.

I

The Decision Below, Because Of Its Far-Reaching Impact On The Concept Of NLRB Joint Certification Of A Collective Bargaining Representative, Presents A Question Of Federal Law Of Such Importance That It Should Be Resolved By This Court. The Decision Below Conflicts With Decisions By The National Labor Relations Board And By The Circuit Courts Of Appeals.

The Federal Arbitration Act, 9 U.S.C. § 9, specifies that "any party to the arbitration" may seek to confirm an arbitrator's award. One not a party to the contract requiring arbitration has always been considered, at least prior to the decision under review, to have no rights under the Act. For example, in Local 13 International Longshoremen's and WU v. Pacific Maritime Association, 441 F2d 1061 (9th Cir. 1971), an earlier Ninth Circuit

decision, a local union moved to vacate an arbitration award under a contract negotiated by its international " on behalf of itself and each and all of its longshore locals." The Ninth Circuit, applying the parallel provisions of Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, held that the local union was not a party to the arbitration and could not avail itself of the Act. 441 F2d at 1064.

In the instant proceeding, the collective bargaining agreement involved only two parties: Smoke-Craft, Inc. and the certified collective bargaining agent of its employees. The Steelworkers was not a party to that agreement and the district court had no jurisdiction over its petition. See, for example, Baker v. Fleet Maintenance Incorporated, 409 F2d 551, 554 (7th Cir. 1969).

The question of whether a union is a party to a collective bargaining agree-

ment, including its arbitration provisions, is "a question for the courts and not an arbitrator." Las Vegas L.J. Ex. Bd. of Cul. W. & B. v. Las Vegas Hacienda, Inc., 383 F2d 667, 668 (9th Cir. 1967). That determination is not difficult in the present case. There was but one NLRB certified collective bargaining agent at Smoke-Craft, Inc., the United Steelworkers of America, AFL-CIO-CLC and Amalgamated Meatcutters and Butcher Workmen of North America, Local 324, AFL-CIO (See certification, R. 67). The collective bargaining agreement was executed by the jointly certified collective bargaining representative, and it specifically refers to that bargaining representative as "the union." (R. 68) Smoke-Craft was not required to deal with the Steelworkers, the Meat Cutters and the Steelworkers-Meat Cutters in some sort of triumvirate.

The National Labor Relations Board has long held that a jointly certified bargaining representative must act as one union only and that it would be improper for particular segments of a jointly certified collective bargaining representative to attempt--as the Steelworkers have attempted in this case--to represent bargaining union employees on their own. For example, in Automatic Heating and Service Company, 194 NLRB 1065 (1972) the Board held that "the filing of a joint petition is a prima facie showing of the requisite intent of the joint petitioners to bargain jointly for the requested unit of employees." And in Mid-South Packers, Inc., 120 NLRB 495, n. 1 (1958) the Board held:

> "The joint petitioners indicated on the record their readiness to represent the employees as joint representatives. Their names will appear jointly on the ballot, and if successful in the election, they will be certified jointly, and the Employer may then insist that they do in fact

> bargain jointly for such employees as a single unit." (emphasis supplied).

If the Steelworkers' arguments were to prevail, any employer dealing with a jointly certified collective bargaining representative would do so at its peril. Any element or segment of the certified representative--no matter how small--could claim that it was the true employee representative and could sue to undo any agreement or settlement reached between the employer and the certified representative. If the Steelworkers could take unilateral action, why not the Meat Cutters? And if both could do so and each saw the employees' interests differently, Smoke-Craft would be faced with conflicting demands. Indeed, if one uncertified segment of a joint collective bargaining representative can invoke federal court jurisdiction, why not any other segment or any individual employee? The Ninth Cir-

cuit's determination in the instant case, leaves open the possibility that, under the Federal Arbitration Act, one constituent of a joint collective bargaining representative could move to confirm an award while another could move to vacate it--a result until now foreclosed under the decided cases.

It is precisely this type of situation that the designation of an exclusive representative is intended to prevent. If the Steelworkers' reasoning were the law, Smoke-Craft employees would have had two "exclusive" bargaining representatives, an obvious contradiction in terms. The National Labor Relations Board has recognized this danger and has applied the National Labor Relations Act so as to avoid it as is shown by its decisions in Automatic Heating & Service Co. and Mid-South Packers, Inc., supra. Under the National Labor Relations Act, employees must speak

and act through one exclusive bargaining representative, and employers have the converse duty to deal with the certified representative and with no other.

We have attempted to illustrate the problems which occur if a faction of the certified bargaining representative is permitted to proceed on its own. These problems only multiply if the employer acquiesces in the faction's unilateral action and deals with the faction and not the representative itself. In the recent case of Int'l Brotherhood of Teamsters v. NLRB, 587 F2d 1176 (D.C. Cir. 1978) the Circuit Court of Appeals for the District of Columbia dealt with a situation where four unions were jointly certified as the bargaining agent. Three of the unions accepted a contract proposal, excluding the fourth union, the Teamsters. The employer, proceeding on the basis of the new contract, discharged a number of Team-

ster adherents who continued to picket after the purported ratification by the other elements of the bargaining representative.

The Teamsters court found that the three unions had acted improperly in proceeding without the Teamsters and, in fact, had breached their duty of fair representation to the Teamsters and to the employees in the unit. National Labor Relations Act, § 8(b)(1)(A).

The Teamsters case illustrates the legal peril to Smoke-Craft inherent in the Steelworkers' "go it alone" strategy: Smoke-Craft would commit an unfair labor practice if it so much as acquiesced in the attempted substitution of an uncertified union for a certified collective bargaining representative. Sherwood Ford, Inc., 188 NLRB 131, 133 (1971). The Sherwood Ford decision recognized that the National Labor Relations Act "created a

mandatory obligation on the employer's part to deal exclusively with the bargaining representative whom the employees have chosen, exacting, as the Supreme Court held in Medo Photo-Supply Corporation v. N.L.R.B., 321 US 678, 684 'the negative duty to treat with no other.'" 188 NLRB at 133.

In summary, decisions of both the federal courts and the National Labor Relations Board wisely hold that (1) uncertified segments of a joint representative cannot proceed unilaterally in their dealing with employers and must instead bargain through the certified joint bargaining representative, jointly as a single unit; (2) the employer is required to deal with certified bargaining representative and only that representative; and (3) only the collective bargaining representative is a party to the contract, only that representative may take grievances under

the contract to arbitration, and only that representative may seek to confirm or vacate an arbitration award.

The Court's decision under Heading B, "Standing," can only lead to enormous mischief. Perhaps the Court was not thinking about ramifications for future cases when it penned those lines, but we submit that those ramifications must be considered. Under the Court's holding, any labor organization which cannot garner majority support by itself can join with one or more other organizations, become "jointly certified," and then proceed with utter disregard to the desires of the "jointly certified" representative. It can proceed unilaterally as if it were the exclusive representative when it has never enjoyed such support. The Employer who signs a contract with such a joint representative will have no assurance that the representative speaks with one voice. He

will constantly be in danger of having two or more conflicting demands thrust upon him simultaneously. In short, the Ninth Circuit has completely destroyed the concept of a jointly certified representative.

In the present case, the Court may have been swayed by the fact that neither the Meat Cutters nor the certified bargaining representative itself formally protested the Steelworkers' unilateral action. But what of it? Even if the Meat Cutters and the certified bargaining representative had intended all along that the joint representative was a sham and that the Steelworkers could go it alone, it is settled (at least until the instant decision was rendered) that this would be unlawful. Suburban Newspaper Publications, Inc., 230 NLRB No. 287 (1977). The point, which the Ninth Circuit's opinion ignores, is that the employees at Smoke-Craft never

chose the Steelworkers to be their representative.

As this Court is aware, a jointly-certified collective bargaining representative is not a rarity. Frequently, the interests of employees are best served by a labor organization composed of two or more unions. However, the fact that the organization is made up of multiple constituent unions does not mean that the employer is under an obligation to deal with each constituent union separately. Having been certified as a single entity, a jointly certified collective bargaining representative has the rights and obligations of a single entity. It is a labor organization certified by the NLRB pursuant to Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c). The employer is required to deal with the certified representative only, and may not attempt to dilute the certified represen-

tative's strength by dealing with any constituent individually. Conversely, the employer is entitled to be free of conflicting demands by the constituent parts of the certified representative.

II

The Decision Below, In Affirming Entry Of Summary Judgment On Issues Which Were Not Treated In The Motion For Summary Judgment, On Which There Were Outstanding And Triable Issues Of Fact, And On Which The District Court Made No Findings As Required By FRCP Rule 56, Is Such A Departure From The Accepted And Usual Course Of Judicial Proceedings In The Federal Courts That It Calls For An Exercise Of This Court's Power Of Supervision.

A. Whether the Arbitration was Settled, and, if so, Whether the Arbitrator Reopened a Settled Matter, are Issues

of Fact which Cannot be Resolved by a Motion for Summary Judgment.

Smoke-Craft's Affirmative Defenses raised five major points which center on the issues of settlement and subsequent re-opening of the arbitration proceeding at the unilateral behest of a non-party: (1) the collective bargaining agreement reserves to the representatives of the parties full authority to settle grievances; (2) a settlement was reached between Smoke-Craft and the exclusive bargaining representative; (3) pursuant to the settlement, Smoke-Craft returned certain persons to employee status and granted them retroactive credit under its profit-sharing plan; (4) the arbitrator, upon being informed of the settlement, closed the case and billed the parties; and (5) the arbitrator subsequently purported to reopen the proceeding at the unilateral behest of the Steelworkers--a non-party,

or at best, a faction of a party--and without the consent of either party to the arbitration.

Throughout this proceeding the Steelworkers has never taken issue with any of these points, but instead has asserted that the arbitrator "considered [the issue of settlement] and determined that no settlement had been proven" (R. 165). However, all of the documents before the district court demonstrated that the arbitrator never addressed the settlement issue in his award, and that he never solicited or received any evidence on that point.

In its opinion, the district court stated "The arbitrator found that the grievance at issue here had not been settled . . ." (R. 269). There is no basis in the record for the court's statement. There was no such finding in the arbitrator's opinion and award and, if there had

been, such a finding would have been worthless, since no evidence was taken on that issue at any time. The district court then goes on to say in its opinion, ". . . and Smoke-Craft declined the opportunity to brief this issue before the arbitrator." (R. 269) Again, no such issue was ever before the arbitrator. By its very nature, the issue came after the settlement and after the purported reopening by the Steelworkers. If the district court is suggesting that Smoke-Craft should have responded to the unauthorized Steelworkers' brief, the prior discussion demonstrates that such a response by Smoke-Craft would have been improper and, indeed, illegal.

In summary, there is no indication in the arbitrator's decision that he considered the issue of settlement or heard any evidence on that point. Nor did he address the issue of whether he could prop-

erly entertain a brief from the Steelworkers alone, rather than the employees' exclusive bargaining representative. The only evidence on the issue is the affidavit of Robert Guard, defendant's Controller, which specifically states, "Following the arbitration hearing, a settlement was reached under which Smoke-Craft, Inc. returned certain persons to active employment status, and granted them retroactive credit under the Smoke-Craft Inc. Profit-Sharing Plan" (R. 65). The documentary evidence supports Mr. Guard's statement. On February 6, 1976, following the settlement, the arbitrator sent his statement for service to defendant and the Meat Cutter/Steelworker certified bargaining representative, adding that he was pleased that the parties "were able to work out a satisfactory agreement." (R. 70)

The district court apparently based its finding that no issue of fact exists

as to settlement exclusively upon Arbitrator Keltner's presumption that none occurred. Of course, Arbitrator Keltner previously had found that a settlement did occur (R. 70-71). Regardless, we submit that an arbitrator's opinion on events which were not the subject of a hearing and were not submitted to him for determination cannot be treated as conclusive in considering a motion for summary judgment. As the Fifth Circuit Court of Appeals stated, in voiding an arbitration award rendered without a hearing,

> "The universal rule in common-law arbitrations is that the parties are entitled to be heard, after reasonable notice, upon the subject matter in dispute." Citizens Bldg. v. Western Union Tel. Co., 120 F2d 982, 984 (5th Cir. 1941)

Echoing this, the Federal Arbitration Act provides that an arbitration award may be vacated because of an arbitrator's misconduct in "refusing to hear evidence

pertinent to the controversy." 9 U.S.C. § 10(c).

In this case the dispute submitted to Arbitrator Keltner for hearing did not concern settlement. The settlement occurred after the Hearing before him. He heard no evidence as to settlement and was in no position to "decide a dispute" on the point.

B. The District Court Did Not Consider the Questions of Fact and Law Raised by Smoke-Craft's Affirmative Defenses and Motion to Vacate.

The peculiar circumstances surrounding the award herein, and the nature of the award itself, led Smoke-Craft to interpose affirmative defenses to the motion to confirm, and to move to vacate the award. These matters were not considered by the district court. Article XVIII of the collective bargaining agreement provides that the arbitrator shall "hear and decide"

grievances and that he "shall not be empowered to alter or amend the terms of this Agreement" (R. 26). Arbitrator Keltner rendered determinations upon matters he had never heard--the parties to the collective bargaining agreement and the settlement which occurred after the Hearing before him. In doing so, he both exceeded his authority and effectively altered the terms of the agreement. When an arbitrator acts in excess of his powers, his award should be vacated. Federal Arbitration Act, 9 U.S.C. § 10(d). Smoke-Craft's allegations in this regard did not involve the court's jurisdiction or the question of whether a settlement took place; rather, they involved Arbitrator Keltner's authority under the collective bargaining agreement to determine those issues without a hearing and in the absence of a submission by the parties. Neither the

district court nor the Court of Appeals addressed these allegations.

Further, defendant's sixth affirmative defense alleged that Arbitrator Keltner had sought to reconvene the arbitration. If this allegation were proved, the award would not be final, and could not be confirmed. At most, the matter, lacking finality, would be remanded to the arbitrator. Federal Arbitration Act, 9 U.S.C. § 10(d). Hanford Atomic Metal Trades Council v. General Electric Co., 353 F2d 302 (9th Cir. 1966). The record before the district court contained no evidence rebutting defendant's allegations.

Defendant's allegations also call into question the award on the grievance itself. Arbitrator Keltner decided that a four-day work week amounted to a layoff of one day per week, and that individuals who had been replaced at their jobs while on

strike were thus entitled to return to work in place of employees then at work. We know of no such award in similar circumstances, and suggest that the award does not rationally draw its essence from the collective bargaining agreement or from industrial practice. Similarly, the arbitrator's acquiescence in the arrogation of party status by a non-party, his violation of a settlement by the true parties, and his reopening of a closed arbitration without the consent of either party are all fundamental errors which would require the court below to vacate the award. The district court simply made no attempt to review the arbitration award in terms of the agreement it purported to apply, and granted summary judgment in the face of defendant's uncontroverted allegations and with no evidence to support the judgment.

It was not necessary for the district court to conclude that the aberrant conduct of the Steelworkers or the arbitrator would require that confirmation of the award be denied or that the award be vacated. Defendant was entitled to prove its allegations and, in the absence of unquestionable evidence to the contrary on the record, we submit that plaintiff's motion for summary judgment should not have been granted.

CONCLUSION

For the reasons stated above, Petitioner requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

JACK B. SCHWARTZ
(Counsel of Record)

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Dated: January __, 1982

Appendix

The National Labor Relations Act (29 U.S.C. § 151, et seq.) provides in pertinent part as follows:

Section 8(a)(5)

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8(b)(1)(A)

"It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7."

Section 9(a)

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

The Federal Arbitration Act (9 U.S.C. § 1, et seq.) provides in pertinent part as follows:

> Section 9
>
> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."
>
> Section 10
>
> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> (a) Where the award was produced by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear

evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

UNITED STEELWORKERS OF
AMERICA, AFL-CIO.CLC,
Plaintiff-Appellee,

v.

SMOKE-CRAFT, INC.
Defendant-Appellant.

No. 78-3697

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 3, 1980.

Decided Aug. 13, 1981.

Appeal from the United States District Court for the District of Oregon.

Before VAN DUSEN*, KILKENNY and HUG, Circuit Judges.

HUG, Circuit Judge:

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*The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Smoke-Craft, Inc. appeals the district court's summary judgment confirming an arbitration award that upheld a union grievance protesting the employer's refusal to honor the seniority rights of former strikers. Two unions were jointly certified as the exclusive bargaining agent of Smoke-Craft's employees. The unions negotiated a collective bargaining agreement with the employer, pursuant to which the grievance arose and was submitted to arbitration by both unions. Settlement negotiations interrupted the arbitration; the arbitration then proceeded with only one of the unions processing the grievance to completion. Smoke-Craft appeals the district court's summary confirmation of the arbitral award on the grounds that genuine issues of material fact remain unresolved and that the union, acting in its individual capacity, had no

standing to seek confirmation of the award in the district court. We affirm.

I. FACTS

Smoke-Craft is an Albany, Oregon beef product manufacturer. In 1974, having failed several times to become the exclusive bargaining representative of Smoke-Craft's employees, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 324 (the Meat Cutters) joined with the United Steelworkers of America, AFL-CIO (the Steelworkers) in asking the employees to elect the unions jointly as exclusive bargaining representative. After the two unions succeeded in their joint effort in the representation election, the National Labor Relations Board certified the two unions jointly in July 1974.

In the wake of a strike, during which Smoke-Craft hired a number of replacement employees, the employer and the joint union leadership concluded a collective bargaining agreement on January 31, 1975, which preserved to strikers their seniority rights for future recalls to employment. Shortly thereafter, the employer reduced the work week from five to four days. Both the Meat Cutters and the Steelworkers contended that this shutdown was a layoff and a recall that triggered the seniority provisions. After the layoff, when Smoke-Craft failed to recall strikers who had more seniority than the replacements the employer did recall, both unions filed a grievance, claiming a violation of the seniority provisions of the collective bargaining agreement.

The parties failed to resolve the dispute themselves and appealed to arbitration procedures. The arbitrator halted

these procedures, however, when requested to do so by a representative of Smoke-Craft and a representative of both unions. The parties apparently believed that there was a possibility of settlement.[1] When three weeks passed without further communication from the parties, the arbitrator submitted a bill for his services along with a letter congratulating the parties on the settlement he assumed had been reached.

The next communication received by the arbitrator was a letter and a brief submitted by the United Steelworkers, a copy of which was sent to the Meat Cutters

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[1] A letter to the arbitrator from Mike Dye, the representative of both the Meat Cutters and the Steelworkers, stated that the parties "have decided to hold off filing any formal briefs . . . because of a possible settlement. Please defer any decision on this case until they have had a chance to work on the possible settlement."

and Smoke-Craft.[2] When contacted by the arbitrator, Smoke-Craft's attorney stated that he was uncertain whether the company would file a responsive brief but he requested and was granted an extension of time to file. When no brief had been received several weeks after the extension period had lapsed, the arbitrator closed the case and rendered his decision. Nothing in the record indicates that Smoke-Craft requested that the arbitrator not proceed, either because the Steelworkers were not authorized to process the grievance without the Meat Cutters or because the dispute had been settled.

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[2]The letter disclosed that the Steelworkers were no longer interested in the joint bargaining representation arrangement with the Meat Cutters. The Meat Cutters, however, had indicated earlier, in a letter from Mike Dye (representing the Meat Cutters) to Wayne Anderson (representing the Steelworkers) dated March 17, 1976, that they were willing to have the Steelworkers proceed with the grievance.

In the opinion accompanying his award for the union, the arbitrator determined that the reduction from a five- to a four-day work week was a layoff under the collective bargaining agreement because it deprived employees of part of their employment. The arbitrator also concluded that the contract required employees to be recalled from layoff in accordance with their seniority. Because Smoke-Craft had not observed seniority in administering the recall, the arbitrator ordered back pay for workers who were not recalled according to their seniority. On the Steelworkers' petition for confirmation of this award, the district court granted summary judgment.

Smoke-Craft contends on appeal that there exist genuine issues of material fact as to (1) whether it was proper for the Steelworkers to proceed unilaterally with the arbitration, and (2) whether the

dispute had been settled. The employer also argues that the Steelworkers did not have standing to seek confirmation of the award in the district court. The central question is whether Smoke-Craft can raise matters in a confirmation proceeding in the district court that were not raised before the arbitrator.

II. ANALYSIS

A. Summary Judgment

Smoke-Craft's first assignment of error is that unresolved issues of material fact remain on the question whether the Steelworkers could proceed properly with the arbitration without the assistance of the Meat Cutters. The parties do not dispute that the arbitration was properly commenced by the unions jointly. In later filing a brief with the arbitrator in an individual capacity, the Steelwork-

ers merely continued the representation of aggrieved employees in a proceeding that was properly commenced; the Steelworkers did not initiate a new proceeding. In fact, the substance of the arbitration proceedings was complete at the time the Steelworkers filed its brief. The arbitrator had received the evidence in earlier hearings, when the joint representation arrangement was still functional.

No party, including Smoke-Craft, raised a question about the propriety of the Steelworkers' representation in its individual capacity. The Steelworkers forwarded copies of the letter to the arbitrator that accompanied the brief to both the Meat Cutters and Smoke-Craft.[3] The record suggests that the Meat Cutters expressly acquiesced in the Steelworkers' representation in the arbitration of this

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grievance.[4] Smoke-Craft's acquiescence must be implied from the absence of any objection on its behalf in the record.

Smoke-Craft's second assignment of error is that unresolved issues of material fact remain on the question of whether the dispute had been settled at the time the arbitrator halted the arbitration proceedings. When the parties, including Smoke-Craft, requested a delay in the arbitration proceedings, they did not represent that a settlement had been reached, only that there was a possibility of settlement. After a period when he

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[4]The Meat Cutters had at least tacitly approved the Steelworkers' unilateral representation of the aggrieved employees in the continued arbitration proceedings. See note 2 supra. There is no evidence in the record of any actual conflict between the unions on the issue of continued representation, including the right to bring a confirmation action, and even if there had been such a conflict, the arbitration proceeding was the correct forum for its resolution.

received no communication from the parties, the arbitrator assumed that the parties had settled the grievance. The arbitrator's subsequent decision, however, that the dispute had not been resolved is well-supported by the record. He received a letter and a brief from the Steelworkers, indicating that the controversy was still alive. In a conversation with the employer's attorney, the arbitrator received no indication that the grievance had been settled, only that Smoke-Craft might file a responsive brief and wanted an extension of time in which to do so. Since the Steelworkers' letter to him had also been forwarded to the Meat Cutters, and the Meat Cutters had not been in contact with him, the arbitrator acted reasonably in proceeding with his decision. All indications were that all the parties desired that he proceed. There is no evidence in the record to the contrary.

Because Smoke-Craft failed to raise before the arbitrator both the question of the propriety of the Steelworkers' individual representation of the aggrieved employees and the question whether a settlement had been reached, we cannot countenance these claims on Appeal. See Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959, 611 F.2d 1286, 1290 (9th Cir. 1980) (failure to object to arbitrator's bias in arbitration proceeding waived issue). Smoke-Craft had an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed. Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator. See Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106, 107-08 (2d Cir. 1971),

cert. denied, 405 U.S. 921, 92 S.Ct. 957, 30 L.Ed.2d 792 (1972). To rule otherwise would be to thwart the national labor policy of encouraging the expeditious private arbitration of labor disputes without resort to the courts. Mogge v. District 8, International Association of Machinists, 454 F.2d 510, 513 (7th Cir. 1971); see generally United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97, 80 S.Ct. 1358, 1360-61, 4 L.Ed.2d 1424 (1960).

B. Standing

Smoke-Craft also contends that the district court erred in holding that the Steelworkers, in its individual capacity, was a party to the collective bargaining agreement, a party to the arbitration, and therefore a party with standing to seek confirmation of the arbitration award. We disagree.

The title page of the collective bargaining agreement indicates clearly that the Steelworkers union was a party to the contract; the contract is entitled an "Agreement between United Steelworkers of America, AFL-CIO and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and Smoke-Craft, Inc." Representatives of both the Steelworkers and the Meat Cutters signed the agreement. The Steelworkers union was therefore a "party to the arbitration" within the terms of the Federal Arbitration Act, 9 U.S.C. § 9, and was entitled to seek confirmation of the arbitral award in the district court.

Joint certification requires that both unions bargain jointly with the employer on behalf of all employees, but once a contract is in place a division of administrative responsibilities under the contract is permissible. The Steelwork-

ers' only independent activity was to pursue to termination the arbitration proceeding that both unions initiated. The Steelworkers' unilateral continuation of the arbitration did not involve a bargaining issue; indeed, it did not even involve the substance of the arbitration itself, as the arbitrator had already received all of the evidence. The continuation was an administrative decision of the Steelworkers to process the grievance to completion by filing a brief with the arbitrator. The Steelworkers had a clear duty to continue to represent all Smoke-Craft employees in the grievance arbitration; they had the tacit approval of the Meat Cutters to do so; and they had the necessary standing in the district court to insure confirmation of the arbitral award.

The summary judgment of the district court for the Steelworkers is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC, Plaintiff-Appellee, v. SMOKE-CRAFT, INC., Defendant-Appellant.	No. 78-3697 D.C. No.CV76-1093 AMENDED OPINION

Appeal from the United States District Court
For the District of Oregon
The Honorable Robert C. Belloni, Presiding
Argued and Submitted November 3, 1980

Before: VAN DUSEN*, KILKENNY and HUG,

Circuit Judges.

HUG, Circuit Judge:

Smoke-Craft, Inc. appeals the district court's summary judgment confirming an arbitration award that upheld a union grievance protesting the employer's refusal to honor the seniority rights of

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former strikers. Two unions were jointly certified as the exclusive bargaining agent of Smoke-Craft's employees. The unions negotiated a collective bargaining agreement with the employer, pursuant to which the grievance arose and was submitted to arbitration by both unions. Settlement negotiations interrupted the arbitration; the arbitration then proceeded with only one of the unions processing the grievance to completion. Smoke-Craft appeals the district court's summary confirmation of the arbitral award on the grounds that genuine issues of material fact remain unresolved and that the union, acting in its individual capacity, had no standing to seek confirmation of the award in the district court. We affirm.

I. FACTS

Smoke-Craft is an Albany, Oregon beef product manufacturer. In 1974, having failed several times to become the exclusive bargaining representative of Smoke-Craft's employees, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 324 (the Meat Cutters) joined with the United Steelworkers of America, AFL-CIO (the Steelworkers) in asking the employees to elect the unions jointly as exclusive bargaining representative. After the two unions succeeded in their joint effort in the representation election, the National Labor Relations Board certified the two unions jointly in July 1974.

In the wake of a strike, during which Smoke-Craft hired a number of replacement employees, the employer and the joint union leadership concluded a collective

bargaining agreement on January 31, 1975, which preserved to strikers their seniority rights for future recalls to employment. Shortly thereafter, the employer reduced the work week from five to four days. Both the Meat Cutters and the Steelworkers contended that this shutdown was a layoff and a recall that triggered the seniority provisions. After the layoff, when Smoke-Craft failed to recall strikers who had more seniority than the replacements the employer did recall, both unions filed a grievance, claiming a violation of the seniority provisions of the collective bargaining agreement.

The parties failed to resolve the dispute themselves and appealed to arbitration procedures. The arbitrator halted these procedures, however, when requested to do so by a representative of Smoke-Craft and a representative of both unions. The parties apparently believed that there

was a possibility of settlement.[1] When three weeks passed without further communication from the parties, the arbitrator submitted a bill for his services along with a letter congratulating the parties on the settlement he assumed had been reached.

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and Smoke-Craft.[2] When contacted by the arbitrator, Smoke-Craft's attorney stated that he was uncertain whether the company would file a responsive brief but he requested and was granted an extension of time to file. When no brief had been received several weeks after the extension period had lapsed, the arbitrator closed the case and rendered his decision. Nothing in the record indicates that Smoke-Craft requested that the arbitrator not proceed, either because the Steelworkers were not authorized to process the grievance without the Meat Cutters or because the dispute had been settled.

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Smoke-Craft contends on appeal that there exist genuine issues of material fact as to (1) whether it was proper for the Steelworkers to proceed unilaterally with the arbitration, and (2) whether the

dispute had been settled. The employer also argues that the Steelworkers did not have standing to seek confirmation of the award in the district court. The central question is whether Smoke-Craft can raise matters in a confirmation proceeding in the district court that were not raised before the arbitrator.

II. ANALYSIS

A. Summary Judgment

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representation in the arbitration of this grievance.[4] Smoke-Craft's acquiescence must be implied from the absence of any objection on its behalf in the record.

Smoke-Craft's second assignment of error is that unresolved issues of material fact remain on the question of whether the dispute had been settled at the time the arbitrator halted the arbitration proceedings. When the parties, including Smoke-Craft, requested a delay in the arbitration proceedings, they did not represent that a settlement had been reached, only that there was a possibility of settlement. After a period when he

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received no communication from the parties, the arbitrator assumed that the parties had settled the grievance. The arbitrator's subsequent decision, however, that the dispute had not been resolved is well-supported by the record. He received a letter and a brief from the Steelworkers, indicating that the controversy was still alive. In a conversation with the employer's attorney, the arbitrator received no indication that the grievance had been settled, only that Smoke-Craft might file a responsive brief and wanted an extension of time in which to do so. Since the Steelworkers' letter to him had also been forwarded to the Meat Cutters, and the Meat Cutters had not been in contact with him, the arbitrator acted reasonably in proceeding with his decision. All indications were that all the parties desired that he proceed. There is no evidence in the record to the contrary.

Because Smoke-Craft failed to raise before the arbitrator both the question of the propriety of the Steelworkers' individual representation of the aggrieved employees and the question whether a settlement had been reached, we cannot countenance these claims on Appeal. See Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959, 611 F.2d 1286, 1290 (9th Cir. 1980) (failure to object to arbitrator's bias in arbitration proceeding waived issue). Smoke-Craft had an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed. Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator. See Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106, 107-08 (2d Cir. 1971),

cert. denied, 405 U.S. 921 (1972). To rule otherwise would be to thwart the national labor policy of encouraging the expeditious private arbitration of labor disputes without resort to the courts. Mogge v. District 8, International Association of Machinists, 454 F.2d 510, 513 (7th Cir. 1971); see generally United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960).

B. Standing

Smoke-Craft also contends that the district court erred in holding that the Steelworkers union was "a party to the arbitration" within the meaning of the Federal Arbitration Act, 9 U.S.C. § 9, with standing to seek confirmation of the arbitration award.

Procedural questions growing out of a dispute properly submitted to arbitration

are for the arbitrator to decide. Hotel and Restaurant Employees and Bartenders Int. Union v. Michelson's Food Services, Inc., 545 F.2d 1248, 1252 (9th Cir. 1976); Bealmer v. Texaco, Incorporated, 427 F2d 885, 887 (9th Cir. 1970); Ass'n of Industrial Scientists v. Shell Development Co., 348 F.2d 385, 389 (9th Cir. 1965). Whether the Steelworkers had standing as a party to the arbitration to proceed with that arbitration, which had been properly commenced, was a procedural matter for the determination of the arbitrator. Smoke-Craft raised no objection to the standing of Steelworkers to proceed with the arbitration. The award of the arbitrator was an implicit finding of such standing. Having failed to raise any objection to the Steelworkers' standing to proceed as "a party to the arbitration" in the arbitration proceeding, Smoke-Craft cannot, at this stage, be heard to assert that the

Steelworkers union lacks standing as a "party to the arbitration" entitled to seek confirmation of the arbitration award in district court.

The Steelworkers had a clear duty to continue to represent all Smoke-Craft employees in the grievance arbitration; they had the tacit approval of the Meat Cutters to do so; their standing to proceed was implicit in the arbitrator's award and was not contested by Smoke-Craft; and they therefore had the necessary standing in the district court to secure confirmation of the arbitral award.

The summary judgment of the district court for the Steelworkers is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC, Plaintiff,	)	Civil No. 76-1093
v.	)	FINDINGS AND RECOMMENDATION
SMOKE-CRAFT, INC., Defendant,	)	

On January 31, 1975, defendant Smoke-Craft entered into a collective bargaining agreement with the bargaining representative for Smoke-Craft employees. That representative, certified by the NLRB, was "United Steelworkers of America, AFL-CIO and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 324, Joint Intervenors."

A grievance was filed in March 1975 by the Steelworker-Meatcutter certified collective bargaining representative. This "unit" represented the employees in an arbitration hearing on December 15,

1975. In February 1976 it appeared that the dispute was settled, and the arbitrator sent in his bill without making a decision.

On April 9, 1976, the Steelworkers alone filed a brief with the arbitrator referring to the "arbitration between Smoke-Craft, Inc. and United Steelworkers of America." Smoke-Craft refused to respond, on the grounds that United Steelworkers was not the collective bargaining agent for its employees, and that there had been no arbitration between Smoke-Craft and United Steelworkers.

On September 2, 1976, the arbitrator entered an opinion finding that Smoke-Craft violated the collective bargaining agreement. The award was captioned as follows: "In the Matter of the Arbitration Between United Steelworkers of America, District 38 and Smoke-Craft, Inc." The Steelworkers thereafter peti-

tioned this court to confirm the arbitration award pursuant to 9 U.S.C. § 9.

Defendant Smoke-Craft now moves to dismiss on the grounds that only a party to the arbitration may petition under 9 U.S.C. § 9 to confirm an arbitration award. Defendant argues that United Steelworkers was neither a party to the collective bargaining agreement nor to the arbitration. For these reasons, defendant claims this court lacks jurisdiction.

The United Steelworkers, along with the Amalgamated Meat Cutters, signed the collective bargaining agreement. The Steelworkers, along with the Meat Cutters, filed the grievance that was ultimately decided by the arbitrator. It is true that the brief filed by the Steelworkers in April misstated the title of the arbitration, as it omitted the name of the Meat Cutters. It is also true that the Arbitrator's decision, though incorrectly

titled, resolved the only dispute that was before the arbitrator.

Defendant's argument that United Steelworkers is not a party must be based on the theory that the only proper party here is the entity consisting of both the Steelworkers and the Meat Cutters. In other words, defendant contends that the two unions lost their identities and were subsumed into the fictitious entity, the joint representative. For this reason, so the argument goes, neither union individually was a party to the arbitration, and thus neither union may by itself petition the court to confirm the award.

To accept defendant's argument would be inconsistent with the line of cases holding that any doubts as to the construction of the Federal Arbitration Act should be resolved with a view towards effectuating its liberal policy promoting arbitration. Int. Union of Op. Eng. #139

v. Carl A. Morse, Inc., 387 F Supp 153 (ED Wis. 1974), aff. 529 F2d 574. The cases have held that the Act "should not be hedged with imagined limitations" Philadelphia Dress Joint Bd. v. Rosinsky, 134 F Supp 607, 612 (ED Pa. 1955), aff. 229 F2d 448, and that the courts should avoid "a grudging type of construction" United Office and Pro. Wkers. v. Monumental Life, 88 F Supp 602, 607 (ED Pa. 1950), and should not "by hair splitting decisions hamstring its operation" Insurance Agents Int. Union v. Prudential 122 F Supp 869, 872 (ED Pa. 1954).

I therefore conclude, in line with the liberal reading which is to be given to the Federal Arbitration Act, that United Steelworkers was a party to the arbitration, and may sue pursuant to 9 U.S.C. § 9 to confirm the arbitration award.

For the reasons given above, defendant's motion to dismiss should be denied.

Dated this 31st day of March, 1977.

/s/ Edward Leavy
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC, Plaintiff, v. SMOKE-CRAFT, INC., Defendant.	Civil No. 76-1093 ORDER

After review of the record and file in this case, the recommendation of the Magistrate is approved. It is understood that this approval relates to a ruling on a motion to dismiss. Of course to the extent that material has been submitted by way of affidavit, and considered, it is properly treated as a motion under Rule 56. It may well be, upon a full development of the facts that a different result will obtain. At the moment, however, for purposes of evaluating a motion to dismiss (or for summary judgment), the

result achieved by the Magistrate is entirely correct, and therefore

It is O R D E R E D that defendant's motion to dismiss is denied.

Dated this 26 day of May, 1977.

/s/ James M. Burns
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STEELWORKERS OF OF AMERICA, AFL-CIO.CLC,	)	
Petitioner-Plaintiff,	)	Civ.No. 76-1093
and	)	FINDINGS AND RECOMMENDATION
SMOKE-CRAFT, INC.,	)	
Respondent-Defendant.	)	

Plaintiff United Steelworkers of America, AFL-CIO.CLC (Steelworkers) brings this action petitioning for an order confirming an award in the arbitration between Steelworkers and Smoke-Craft, Inc. (Smoke-Craft). Jurisdiction is invoked under 29 U.S.C. § 185, § 301 of the Labor Management Relations Act of 1947, as amended, and 9 U.S.C. § 9.

Steelworkers now moves for summary judgment, asserting there is no genuine issue of material fact. Its motion should be granted.

Prior to discussing the parties' arguments on the law, I will list the events leading to this action.

July 1, 1974-Steelworkers and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 324 (Meat Cutters) were jointly certified as the exclusive collective bargaining representatives for Smoke-Craft's employees.

January 31, 1975-Steelworkers, Meat Cutters and Smoke-Craft entered a written collective bargaining agreement.

March, 1975-Steelworkers and Meat Cutters filed a grievance against Smoke-Craft.

December 15, 1975-Steelworkers, Meat Cutters and Smoke-Craft appeared at the arbitration hearing before an arbitrator.

December 31, 1975-The collective bargaining agreement terminated.

January 14, 1976-The arbitrator received a letter indicating a possible settlement of the grievance.

February 5, 1976-The arbitrator closed the case believing it to be settled and sent the parties a cost bill.

March 17, 1976-Steelworkers informed the NLRB that it disclaimed any further interest in representing Smoke-

Craft's employees as a joint representative with the Meat Cutters.

April 9, 1976-Steelworkers filed a brief with the arbitrator for the continuation of the arbitration.

April 12, 1976-NLRB decertified the Steelworkers and Meat Cutters as joint representatives.

September 2, 1976-The arbitrator issued his decision in favor of the Steelworkers.

December 23, 1976-Steelworkers filed the petition in this court seeking enforcement of the arbitration award.

In my findings and recommendation approved by Judge Burns on May 26, 1977, which denied Smoke-Craft's motion to dismiss, I determined that Steelworkers was a party to the arbitration proceedings and could sue to confirm the arbitration award pursuant to 9 U.S.C. § 9.

Smoke-Craft in its answer to the petition raised seven affirmative defenses. The first four defenses revolve around its allegation that Steelworkers was not a party to the collective bargain-

ing agreement or arbitration. In the fifth defense, Smoke-Craft alleges the grievance had been settled. The fourth through seventh defenses allege either that the arbitrator exceeded his authority or that the decision was improper.

Smoke-Craft's argument that Steelworkers is not a party is based on its theory that because the Steelworkers and Meat Cutters were certified as joint representatives, they can only act as one entity. The argument continues that the Steelworkers or Meat Cutters signed as one entity and thus were not individual signatories to the collective bargaining agreement. Therefore, Smoke-Craft contends that as neither Steelworkers nor Meat Cutters had any individual capacity to represent the employees, Steelworkers could not unilaterally seek to continue the arbitration on April 9, 1976.

Although Smoke-Craft asserts that there are material issues of fact in dispute, I disagree. The facts are straightforward; it is the legal effect which should be given to these facts which is in dispute.

First, Smoke-Craft contends there is an issue of fact concerning who was certified by the NLRB as the collective bargaining agent of its employees. There is no dispute that both Steelworkers and Meat Cutters were jointly certified as the exclusive collective bargaining representatives. Instead, the issue is the extent to which each union could subsequently act unilaterally.

Joint certification carries with it the obligation of the two unions to bargain jointly for all the employees in the unit they seek to represent. Automatic Heating & Service Co., 194 NLRB 1065 (1972). However, once the contract is

negotiated with an employer, the administrative division of employees to enable the unions to service the employees has been found not to be inconsistent with the concept of joint representation. Utility Services, Inc., 158 NLRB 592 (1966).

For the duration of the collective bargaining agreement, there is no indication that the Steelworkers and Meat Cutters acted independently. Representatives of both unions signed the collective bargaining agreement. The unions jointly filed the grievance against Smoke-Craft. Both unions were present at the arbitration hearing. Steelworker's only independent activity was to pursue to termination the arbitration proceeding which both unions initiated.

The unilateral reopening of arbitration did not involve a bargaining issue, as the collective bargaining contract had already been entered and terminated.

Instead, the reopening involved an administrative decision on Steelworker's part to process the grievance to completion. The Steelworkers had a duty to continue to represent all of Smoke-Craft's employees if the grievance had not been settled. See infra. This duty could not be avoided by the absence of further participation by Meat Cutters in the proceeding. There is no indication that Steelworkers acted other than in the interest of all of the employees.

Next, Smoke-Craft contends that Steelworkers was not a party to the agreement which provides for arbitration and thus it concludes Steelworkers was not a party to the arbitration proceeding and cannot enforce the arbitration award in this court.

It has been recognized that under the Federal Arbitration Act an obligation to arbitrate can attach to those who have

not personally signed the written arbitration provision under principles of contract law. Fisser v. International Bank, 283 F.2d 231 (1960) or where necessary to support the national policy favoring arbitration. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Teamsters Local 524 v. Billington, 402 F.2d 510 (9th Cir. 1968).

The cases Smoke-Craft cite are ones in which the courts determined that certain entities had no rights under the agreement to arbitrate and thus were not parties. See Baker v. Fleet Maintenance, Inc., 409 F.2d 551 (7th Cir. 1969); Local 13, Int. Longshoremen's & W. V. v. Pacific Mar. Ass'n, 441 F.2d 1061 (9th Cir. 1971); Las Vegas Culinary Workers v. Las Vegas Hacienda, 383 F.2d 667 (9th Cir. 1967). However, in the case at bar, the title page of the collective bargaining agreement reads as follows:

A-50

" AGREEMENT

between

UNITED STEELWORKERS OF AMERICA, AFL-CIO

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN of NORTH AMERICA, AFL-CIO

and

SMOKE-CRAFT, INC.

January 31, 1975 "

Representatives of both Steelworkers and Meat Cutters signed the agreement. It is clear that Steelworkers had an interest in the contract. I find that it was a party to this agreement.

Smoke-Craft also contends there is an issue of fact concerning who participated in the grievance proceedings. Again, the basis of this disagreement is Smoke-Craft's adherence to its position that Steelworkers could not participate as an individual entity, but instead had originally appeared as part of the collective

bargaining unit (composed of Steelworkers and Meat Cutters). My previous determination that Steelworkers was a party to the arbitration settles what is in reality an issue of law.

Although the arbitrator in his decision clearly found there been no settlement, Smoke-Craft contends this is an issue of fact. The arbitrator's belief in the existence or non-existence of the settlement was the cause of his decisions to close and then to reopen the arbitration proceedings. Smoke-Craft also cites the reopening of the proceedings at Steelworker's request as an issue of fact.

The arbitrator's decision that no settlement occurred and the proceedings should be reopened could be characterized as either a procedural or substantive matter. If viewed as a matter of contract interpretation, the court is bound to accept the arbitrator's determination.

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960). Procedural disagreements can be viewed as aspects of the dispute which necessitate the grievance proceedings. Thus procedural questions would also be decided by the arbitrator. John Wiley & Sons v. Livingston, supra; Association of Industrial Scientists v. Shell Develop. Co., 348 F.2d 385 (1965).

However, as Smoke-Craft points out, Wiley dealt with the question of whether procedural prerequisites to arbitration should be decided by the arbitrator. Here, the arbitration was in progress when the settlement question arose. If the court can compel parties to an arbitration agreement to submit a preliminary dispute over the existence of a settlement to arbitration Office & Pro. Emp. I.U.L. No. 9 v. Allied Indus. W.I.U., 397 F.Supp 688 (E.D. Wisc. 1975), it is logical that

a court can confirm an award when an arbitrator decides a dispute concerning existence of a settlement which arises in the course of the arbitration proceeding. In view of the arbitrator's decision, there is no issue of fact concerning the non-existence of a settlement between the Steelworkers, Meat Cutters and Smoke-Craft.

In United States Gypsum Co. v. United Steelworkers of Amer., 384 F.2d 38 (5th Cir. 1967), cert. denied, 398 U.S. 1042 (1968), the court held that the union which had been decertified could clearly assert grievances concerning substantive rights under the agreement which ripened up to the time of the decertification.

Here, the grievance was properly filed by both Steelworkers and Meat Cutters. The termination of the collective bargaining agreement, the attempt to become decertified and the failure of Meat

Cutters to participate in the request to reopen the arbitration proceedings did not relieve Steelworkers of its duty to continue to act on behalf of all of Smoke-Craft's employees with respect to disputes which were pending prior to the decertification. For whatever reason Meat Cutters discontinued active participation in the proceedings, the employees were entitled to be represented by an advocate who would represent all of their interests.

I find that there is no genuine issue of material fact. Accordingly, Steelworker's motion for summary judgment should be granted.

Dated this 5th day of December, 1977.

/s/ Edward Leavy
United States Magistrate

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STEELWORKERS OF AMERICA, AFL-CIO,	)	
Plaintiff,	)	Civil No. 76-1093
v.	)	ORDER
SMOKE-CRAFT, INC.,	)	
Defendant.	)	

Defendant has filed objections to Magistrate Leavy's findings and recommendation of December 5, 1977. Pursuant to 28 U.S.C. 636(b)(1), I have made a de novo review of those portions of the findings and recommendation to which objection has been made.

I agree with the result reached by Magistrate Leavy. The arbitrator found that the grievance at issue here had not been settled, and Smoke-Craft declined the opportunity to brief this issue before the arbitrator. I therefore decline to vacate this part of the arbitrator's award. NLRB v. Hatch, Inc., 484 F.2d 558, 562 (9 Cir.

1974). Since the grievance had not been settled, the arbitration was still open. Steelworkers and Meat Cutters had been decertified as joint representatives of Smoke-Craft's employees. They could nevertheless continue to completion the arbitration they had begun as joint representative. United States Gypsum v. United Steelworkers, 384 F.2d 38, 45-45 (5 Cir. 1967). The record shows, without contradiction, that counsel for Meat Cutters knew of and acquiesced in Steelworkers' filing of its April 9, 1976 brief with the arbitrator. Exhibit A to plaintiff's supplemental memorandum. Plaintiff was therefore a party to the arbitration and is entitled to confirmation of the award.

IT IS ORDERED that plaintiff's motion for summary judgment is granted.

Plaintiff's counsel shall prepare a form of judgment, submit it to defendant's counsel for approval as to form, and defen-

dant's counsel shall submit the form of judgment to the Court.

Dated: August 16, 1978.

/s/ Robert C. Belloni
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC, Petitioner-Plaintiff, and SMOKE-CRAFT, INC., Respondent-Defendant.	Civil Action No. 76-1093 JUDGMENT

On review of the Findings and Recommendation of the Magistrate of December 5, 1977, it is

HEREBY ORDERED AND ADJUDGED:

1. The Findings and Recommendation of the Magistrate are approved.

2. The Petitioner's Motion for Summary Judgment is granted.

3. The arbitration award of September 2, 1976, is confirmed.

4. Petitioner shall have judgment against Respondent for its costs and disbursements incurred herein.

DATED this 18 day of October, 1978.

/s/ Robert C. Belloni
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC,	)	
Plaintiff-Appellee,	)	No. 78-3697
vs.	)	DC CV 76-1093 RCB
SMOKE-CRAFT, INC.,	)	
Defendant-Appellant.	)	

APPEAL from the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 13, 1981.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC,	)	
Plaintiff-Appellee,	)	No. 78-3697
v.	)	D.C. No. CV 76-1093
SMOKE-CRAFT, INC.,	)	
Defendant-Appellant.	)	ORDER

Appeal from the United States District Court for the District of Oregon

Before: VAN DUSEN*, KILKENNY and HUG, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc; Judge Kilkenny has recommended that the suggestion be rejected; and Judge Van Dusen makes no recommendation. An amended opinion has been filed in this case.

The full court has been advised of the en banc suggestion and no judge of the

court has requested a vote on it. Fed. R. App. P. 35(b).

The Petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.